

1 CINDY COHN (SBN 145997)
 cindy@eff.org
 2 DAVID GREENE (SBN 160107)
 LEE TIEN (SBN 148216)
 3 KURT OPSAHL (SBN 191303)
 JAMES S. TYRE (SBN 083117)
 4 ANDREW CROCKER (SBN 291596)
 JAMIE L. WILLIAMS (SBN 279046)
 5 AARON MACKAY (SBN 286647)
 ELECTRONIC FRONTIER FOUNDATION
 6 815 Eddy Street
 San Francisco, CA 94109
 7 Telephone: (415) 436-9333
 Fax: (415) 436-9993
 8
 RICHARD R. WIEBE (SBN 121156)
 9 wiebe@pacbell.net
 LAW OFFICE OF RICHARD R. WIEBE
 10 44 Montgomery Street, Suite 650
 San Francisco, CA 94104
 11 Telephone: (415) 433-3200
 Fax: (415) 433-6382
 12

RACHAEL E. MENY (SBN 178514)
 rmeny@keker.com
 BENJAMIN W. BERKOWITZ (SBN 244441)
 PHILIP J. TASSIN (SBN 287787)
 KEKER, VAN NEST & PETERS, LLP
 633 Battery Street
 San Francisco, CA 94111
 Telephone: (415) 391-5400
 Fax: (415) 397-7188
 THOMAS E. MOORE III (SBN 115107)
 tmoore@rroyselaw.com
 ROYSE LAW FIRM, PC
 149 Commonwealth Drive, Suite 1001
 Menlo Park, CA 94025
 Telephone: (650) 813-9700
 Fax: (650) 813-9777
 ARAM ANTARAMIAN (SBN 239070)
 antaramian@sonic.net
 LAW OFFICE OF ARAM ANTARAMIAN
 1714 Blake Street
 Berkeley, CA 94703
 Telephone: (510) 289-1626

13 Attorneys for Plaintiffs

14
 15
 16 UNITED STATES DISTRICT COURT
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

19) CASE NO. 08-CV-4373-JSW
 20)
 CAROLYN JEWEL, TASH HEPTING,)
 YOUNG BOON HICKS, as executrix of the)
 21) estate of GREGORY HICKS, ERIK KNUTZEN)
 and JOICE WALTON, on behalf of themselves)
 22) and all others similarly situated,)
)
 23) Plaintiffs,)
)
 24) v.)
)
 25) NATIONAL SECURITY AGENCY, *et al.*,)
)
 26) Defendants.)

PLAINTIFFS' BRIEF re *Fazaga v. FBI*
 Date: March 29, 2019
 Time: 9:00 a.m.
 Courtroom 5, Second Floor
 The Honorable Jeffrey S. White

1 In *Fazaga v. FBI*, the Ninth Circuit has given this Court a clear command to decide
2 plaintiffs' claims on their merits using secret evidence under the protective procedures of section
3 1806(f), title 50 U.S.C. *Fazaga v. FBI*, 2019 WL 961953, No. 12-56867 (9th Cir. Feb. 28, 2019)
4 (all further star page citations (e.g., “*27”) are to the Westlaw version, which is attached to ECF
5 No. 450). *Fazaga* provides the Court with the path forward to resolving this lawsuit, and disposes
6 of all of the government's objections to using section 1806(f) to decide all issues before the Court.

7 In summary, the Ninth Circuit held: (1) The procedures of section 1806(f) displace the
8 state secrets privilege and preclude dismissal of unlawful surveillance claims on the basis of the
9 state secrets privilege (*Fazaga*, *22, *24); (2) section 1806(f)'s procedures, its displacement of the
10 state secrets privilege, and its preclusion of state-secrets dismissals applies to surveillance claims
11 brought under any statutory or constitutional provision (*id.* at *27); (3) section 1806(f) applies to
12 affirmative litigation brought by plaintiffs (*id.* at *25-*27); (4) the determination of whether a
13 plaintiff is an “aggrieved person” for purposes of using section 1806(f) is made based on the
14 allegations put forth by the plaintiff (*id.* at *9, *28); (5) once the Court receives evidence under the
15 procedures of section 1806(f), it must use the evidence to decide all statutory and constitutional
16 claims (*id.* at *27, *38-*39). These points are addressed further in the sections that follow.

17 *Fazaga* is a carefully reasoned and deeply considered decision. In reaching the conclusion
18 that section 1806(f) completely displaces the state secrets privilege in electronic surveillance cases
19 and requires the use of secret evidence to decide claims on their merits, the Ninth Circuit
20 considered and rejected a host of arguments raised by the government not only in *Fazaga* but also
21 in this case as well. In support of its holding, the Ninth Circuit cited with approval this Court's
22 holding that section 1806(f) displaces the state secrets privilege. *Fazaga*, *17 (quoting *Jewel v.*
23 *NSA*, 965 F. Supp. 2d 1090, 1105-06 (N.D. Cal. 2013)).

24 **I. Section 1806(f) Displaces The State Secrets Privilege And Precludes Dismissal Of**
25 **Unlawful Surveillance Claims On The Basis Of The State Secrets Privilege**

26 In its Order requiring the current round of dispositive briefing, the Court ruled that even in
27 cases to which section 1806(f) applies, a court may nonetheless dismiss the case on the basis of the
28 state secrets privilege: “[T]he Court is now tasked with the broader substantive question of

1 whether ‘even if the claims and defenses might theoretically be established without relying on
2 privileged evidence, it may be impossible to proceed with the litigation because . . . litigating the
3 case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.’
4 *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc). Plaintiffs’
5 position that once the procedures for the handling of materials and information set forth in section
6 1806(f) have been invoked, the state secrets doctrine may not be a potential substantive bar to the
7 ongoing litigation is inaccurate.” ECF No. 410 at 2.

8 *Fazaga* has now made clear that the Court’s ruling is error, and that Congress’s
9 displacement of the state secrets privilege with the procedures of section 1806(f) forbids dismissal
10 on state secrets grounds.

11 *Fazaga* holds that section 1806(f) completely displaces the state secrets privilege in
12 electronic surveillance cases and precludes any state secrets dismissal. *Fazaga*, *19 (quoting
13 *Mohamed*, 614 F.3d at 1083), *21-*24. The Ninth Circuit held it was “Congress’s intent to make
14 the *in camera* and *ex parte* procedure the exclusive procedure for evaluating evidence that
15 threatens national security in the context of electronic surveillance-related determinations. *That*
16 *mandatory procedure necessarily overrides*, on the one hand, the usual procedural rules precluding
17 such severe compromises of the adversary process and, on the other, *the state secrets evidentiary*
18 *dismissal option.*” *Id.* at *22 (italics added, citation omitted).

19 “FISA displaces the dismissal remedy of the common law state secrets privilege as applied
20 to electronic surveillance generally.” *Fazaga*, *17. “That § 1806(f) requires *in camera* and *ex*
21 *parte* review in the exact circumstance that could otherwise trigger dismissal of the case
22 demonstrates that § 1806(f) supplies an alternative mechanism for the consideration of electronic
23 state secrets evidence. Section 1806(f) therefore eliminates the need to dismiss the case entirely . .
24 . . .” *Id.* at *23. “The legislative history of FISA confirms Congress’s intent to displace the remedy
25 of dismissal for the common law state secrets privilege.” *Id.*

26 Accordingly, plaintiffs’ claims cannot be dismissed on state-secrets grounds.
27
28

1 **II. Section 1806(f) Applies To All Statutory And Constitutional Claims Challenging The**
2 **Lawfulness Of Surveillance, Not Just Claims Under Section 1810 Of FISA**

3 Section 1806(f)'s procedures, its displacement of the state secrets privilege, and its
4 preclusion of state-secrets dismissals applies to surveillance claims brought under any statutory or
5 constitutional provision, not just claims under FISA's civil cause of action in 50 U.S.C. § 1810.
6 *Fazaga*, *24-*27. And it applies to plaintiffs prosecuting affirmative civil claims against the
7 government and seeking evidence to prove their case, not just to the government's defensive use of
8 surveillance-related evidence (*id.*):

9 "Congress intended FISA to displace the state secrets privilege and its dismissal remedy
10 with respect to electronic surveillance. Contrary to the Government's contention, FISA's § 1806(f)
11 procedures are to be used when an aggrieved person affirmatively challenges, in any civil case, the
12 legality of electronic surveillance or its use in litigation, whether the challenge is under FISA itself,
13 the Constitution, or any other law." *Fazaga*, *27.

14 Section 1806(f) thus requires a court to use the secret evidence it receives to decide the
15 merits of all surveillance-related statutory and constitutional claims. *Id.* at *27, *38-*39. *Fazaga*
16 concluded that section 1806(f) applies to all claims arising out of "electronic surveillance" as
17 defined by section 1801(f) of FISA. *Fazaga*, *9-*10, *27. *Fazaga* calls this "FISA-covered
18 electronic surveillance." *Id.* at *40; *see also id.* at *10 ("the applicability of FISA's alternative
19 procedures for reviewing state secrets evidence turns on whether the surveillance at issue
20 constitutes 'electronic surveillance' within the meaning of FISA").

21 Plaintiffs' Internet interception claims challenge FISA-covered electronic surveillance, i.e.,
22 the acquisition in the U.S. of plaintiffs' wire communications, and so fall squarely within section
23 1806(f). 50 U.S.C. § 1801(f)(2). But in this lawsuit, by virtue of section 2712 of title 18 U.S.C.,
24 section 1806(f) sweeps even more broadly than it does in *Fazaga*. As the Court has repeatedly
25 held and as plaintiffs discuss in their briefing on the pending cross-motions, section 2712(b)(4)
26 broadens the scope of section 1806(f)'s application from electronic surveillance as defined in FISA
27 (50 U.S.C. § 1801(f)) to include as well interceptions of communications under the Wiretap Act
28 and the acquisition of communications records under the Stored Communications Act. ECF
No. 347 at 1-2; ECF No. 340 at 2; *Jewel*, 965 F. Supp. 2d at 1105; ECF No. 417 at 23-24, 28-29.

III. “Aggrieved Person” Status Is Determined By Plaintiffs’ Well-Pleaded Allegations

Fazaga also holds that the determination of whether a plaintiff is an “aggrieved person” entitled to use section 1806(f) is made based on the plaintiff’s allegations. *Fazaga*, *9, *28.

The Ninth Circuit held in *Fazaga* that the plaintiffs adequately alleged they were “aggrieved persons” under section 1801(k) by alleging in detail that they were subjected to surveillance. *Fazaga*, *9. It next addressed “whether FISA’s § 1806(f) procedures may be used in this case,” holding that “Plaintiffs must satisfy the definition of an ‘aggrieved person,’ *see id.* § 1801(k).” *Fazaga*, *28. Citing its earlier conclusion that the plaintiffs had adequately alleged they were “aggrieved persons,” the Ninth Circuit held on the basis of their allegations alone that “Plaintiffs are properly considered ‘aggrieved’ for purposes of FISA.” *Id.*

The Ninth Circuit’s remand order further confirms that no additional proof of aggrieved-person status beyond well-pleaded allegations is required. The Ninth Circuit instructed the district court on remand to proceed directly to using section 1806(f) and reviewing the secret evidence to determine whether the surveillance of the plaintiffs was lawfully authorized and conducted:

“In light of our conclusion regarding the reach of FISA § 1806(f), the district court should, using § 1806(f)’s *ex parte* and *in camera* procedures, review any ‘materials relating to the surveillance as may be necessary,’ 50 U.S.C. § 1806(f), including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the electronic surveillance was lawfully authorized and conducted. That determination will include, to the extent we have concluded that the complaint states a claim regarding each such provision, whether Defendants violated any of the constitutional and statutory provisions asserted by Plaintiffs in their complaint.” *Fazaga*, *38.

The Ninth Circuit did *not* require that the plaintiffs make any further showing or proof that they were aggrieved persons before the district court used section 1806(f) to review secret evidence in deciding their claims on the merits.

Fazaga thus forecloses any requirement that a plaintiff who has adequately alleged surveillance claims (as the Ninth Circuit has already held plaintiffs here have done, *Jewel v. NSA*, 673 F.3d 902, 908-10 (9th Cir. 2011)) must further prove “aggrieved person” status before the use

1 of section 1806(f) is triggered.

2 In any event, as plaintiffs have demonstrated, they have not only pleaded but have proven
3 that they are “aggrieved persons” under section 1806(f), under section 2712, under the
4 government’s proffered “zone of interests” standard, or any other possible standard. ECF No. 417
5 at 23-28; ECF No. 429-3 at 18-20.

6 **IV. The Court Must Use Section 1806(f) To Decide Plaintiffs’ Claims On The Merits**

7 In obedience to the Ninth Circuit’s holdings in *Fazaga*, and for all the reasons stated in
8 plaintiffs’ briefing on the pending cross-motions, the Court should grant plaintiffs’ cross-motion
9 and proceed forward using the procedures of section 1806(f) to receive state-secrets evidence. It
10 must use all the relevant secret evidence, together with the public evidence, in deciding whether a
11 reasonable trier of fact could conclude that plaintiffs have suffered an injury-in-fact—the issue of
12 standing tendered by the government’s summary judgment motion. The Court must then use the
13 secret evidence in deciding the merits of plaintiffs’ claims. Any other course would defy the
14 commands of Congress and the Ninth Circuit.

15 **V. The Court Must Reconsider Its Ruling On Plaintiffs’ Fourth Amendment Claims**

16 Finally, the Ninth Circuit’s *Fazaga* decision will require the Court to revisit its ruling on
17 plaintiffs’ Fourth Amendment Internet interception claims. ECF No. 321; *see* N.D. Cal.
18 L. R. 7-9(b)(2) (reconsideration merited by a change in law). The Court granted summary
19 judgment on the Fourth Amendment claims for lack of standing, but without using the procedures
20 of section 1806(f) to compel all of the relevant secret evidence and apply that evidence along with
21 the public evidence to the determination of plaintiffs’ standing. ECF No. 321 at 9 (excluding
22 evidence under the state secrets privilege). *Fazaga* makes clear that the Court’s exclusion of secret
23 evidence and failure to use section 1806(f) was erroneous. *Fazaga* requires that section 1806(f) be
24 used for constitutional as well as statutory claims of unlawful surveillance, and that those
25 constitutional claims be decided on the merits using any relevant secret evidence. *Fazaga*, *27,
26 *38-*39; *see also* ECF No. 417 at 17-21.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATE: March 11, 2019

Respectfully submitted,

s/ Richard R. Wiebe

Richard R. Wiebe

CINDY COHN
DAVID GREENE
LEE TIEN
KURT OPSAHL
JAMES S. TYRE
ANDREW CROCKER
JAMIE L. WILLIAMS
AARON MACKEY
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE

THOMAS E. MOORE III
ROYSE LAW FIRM, PC

RACHAEL E. MENY
BENJAMIN W. BERKOWITZ
PHILIP J. TASSIN
KEKER, VAN NEST & PETERS LLP

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN

Attorneys for Plaintiffs